The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 708
INTRODUCER:	Senator Burgess
SUBJECT:	Estoppel Letters
DATE:	March 20, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bond	Cibula	JU	**Favorable**
2.			RC	

I. Summary:

SB 708 revises Florida law regarding estoppel letters provided by mortgagees and mortgage servicers. Specifically, the bill:

- Reduces the time to respond to an estoppel letter request from 14 days to 10 days.
- Allows a mortgagee or mortgage servicer to send a corrected estoppel letter, so long as the previous estoppel letter was not relied upon.
- Prohibits a mortgagee or mortgage servicer from qualifying, reserving the right to change, or conditioning or disclaiming the reliance of others on a current, valid estoppel letter.
- Prohibits a mortgagee or mortgage servicer from refusing to accept funds received that conform with the amount provided in a current, valid estoppel letter; and requires the mortgagee or mortgage servicer to apply such funds to the balance of the loan.
- Requires a mortgagee or mortgage servicer to execute an instrument acknowledging release of the mortgage and send it for recording in the official records of the proper county within 60 days of payoff. The recorded release must be sent to the mortgagor or record title owner of the property. The bill also provides for attorney fees for prevailing parties in civil actions relating to these requirements.
- Specifies that the release of a mortgage does not necessarily relieve the mortgagor, or the mortgagor's successors or assigns, from any personal liability on the loan or other obligations previously secured by the mortgage.
- Provides the requirements for making and responding to an estoppel letter request.
- Standardizes the minimum contents of an estoppel letter.
- Provides for application to existing mortgages.

The effective date of the bill is October 1, 2023.

II. Present Situation:

Estoppel Letters

In general, an estoppel letter (or estoppel certificate) is a legal document that stops someone from claiming different facts or terms regarding an agreement.[1] In regards to real estate, these types of letters are typically used to confirm amounts of moneys owed that attach to a certain piece of property, such as mortgage debt, condominium association fees, homeowners' association fees, and outstanding claims or deposits due to tenants. Estoppel letters are often sought prior to closing on a real estate transaction as part of the closing agent's due diligence. Closing agents rely on estoppel letters to determine proper amounts due as part of the settlement process.

In Florida, s. 701.04, F.S., provides the requirements for estoppel letters in regards to real estate mortgages (these letters are also commonly known as mortgage payoff letters).[2] Section 701.04(1), F.S., requires that a mortgage lender (also known as the mortgagee) or mortgage servicer deliver to the requestor, within 14 days after receipt of a written request, a mortgage payoff letter setting forth the unpaid balance of the loan secured by the mortgage. The request may be made by a mortgagor (the borrower under the mortgage), a record title owner of the property, a fiduciary or trustee lawfully acting on behalf of a record title owner, or any other person lawfully authorized to act on behalf of a mortgagor or record title owner of the property.

Section 701.04(2), F.S., requires that, upon the payment of the money due on a mortgage, the mortgage lender or servicer must execute in writing an instrument acknowledging satisfaction of the mortgage and have the instrument acknowledged, or proven, and duly entered in the official records of the proper county.[3] Within 60 days after the date of receipt of the full payment of the mortgage the person required to acknowledge satisfaction of the mortgage must send or cause to be sent the recorded satisfaction to the person who has made the full payment. In the case of a civil action arising out of these requirements, the prevailing party is entitled to attorney fees and costs.

It is notable, that s. 701.04(2), F.S., requires the *full* payment of the mortgage, not the amount that was specified in the estoppel letter provided pursuant to 701.04(1), F.S. This is in contrast with homeowners' association estoppel certificates in Florida where s. 720.30851(3), F.S., specifically states that a homeowners' association "waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns." Similar language regarding estoppel certificates applies to unpaid condominium association assessments and unpaid rents and assessments due to cooperatives (i.e. co-ops).[4] A mortgagee is not

[1] *Estoppel Letter*, CREPedia, https://www.crepedia.com/dictionary/definitions/estoppel-letter/ (last visited Feb. 4, 2022); and *What is an Estoppel Certificate*, Redfin https://www.redfin.com/definition/estoppel-certificate (last visited Feb. 4, 2022).
[2] Section 701.041, F.S., defines an estoppel letter in regards to mortgages as a statement of the amount of the unpaid balance of a loan secured by a mortgage, including principal, interest, and any other charges properly due under or secured by the mortgage; and the interest on a per-day basis for the unpaid balance.
[3] Section 701.04(2), F.S., also applies to liens and judgments attached to a property.
[4] Section 718.116(8)(c) states that a condominium association "waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns." 719.108(6)(c), F.S. states that a cooperative association "waives the right to collect any

necessarily held to the same waiver of rights to collect additional moneys from a mortgagor upon the provision of an estoppel letter as s. 701.04, F.S., does not provide a similar waiver provision as seen for homeowners' associations, condominium associations, and cooperatives.[5]

Qualifying Language in Estoppel Letters

Some mortgage servicers and lenders, when sending the estoppel letter required under 701.04(2), F.S., include language which seeks to reserve that servicer's or lender's right to change the amounts listed in the payoff letter or disclaiming the reliance of others on the information in the payoff letter. Examples of such language include:

- "The payoff figures provided are subject to final verification by the Note Holder. The noteholder reserves the right to adjust these figures and refuse or accept any funds which are insufficient to satisfy the full indebtedness for any reason."
- "The payoff amount is subject to our final verification once we receive payoff funds. … If the payoff funds received are insufficient to pay off the account in full for any reason including, but not limited to, error in calculation, NSF, or additional escrow disbursements and/or adjustments. [We] reserve the right to decline to pay the account in full. In addition, any and all interest will be due at the time of payoff."
- "We will not be bound by errors and/or omissions contained herein."[6]

Such language can frustrate the parties involved in a real estate transaction since, arguably, the amounts provided in estoppel letters with such language cannot be definitively relied upon. In the event that the mortgage lender or servicer determines after sending an estoppel letter that the borrower owes additional money beyond that provided in the estoppel letter, some mortgage lenders or servicers return all of the funds received from the closing and demand full payment—even if such funds were sent in reliance on an estoppel letter that was never corrected or revised by the lender or servicer. This can result in the continued accrual of interest on the full amount of the mortgage (not just the amount in dispute) during the pendency of resolving the discrepancy in the amount owed. Further, prior to resolution of the discrepancy, there may not be clear title to the property.[7]

Because the closing agent has a duty to assure clear title in the buyer, some closing agents have been put in the difficult position of having to pay the difference between the conditional estoppel letter and the amended amount. Effectively, this is forcing closing agents to pay for the mistakes of the mortgage lenders, a mistake that they have no control over.

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moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns."

[5] *But see*, *Rissman on Behalf of Rissman Inv. Co. v. Kilbourne*, 643 So. 2d 1136, 1139 (Fla. 1st DCA 1994), where the 1st District Court of Appeal found that a lender could be estopped from claiming additional moneys after an estoppel letter. The facts of this case, however, were rather unique. As the court mentioned, the mortgagee regularly reaffirmed the amount given in the estoppel letter over a number of years. In addition, the mortgagor made a number of transactions based in detrimental reliance on the amount provided by the mortgagee.

[6] *See* Email from Melissa Murphy, Executive Vice President, Chief Legal Officer & General Counsel, The Fund (Feb. 28, 2023 at 9:26 EST) (on file with the Senate Judiciary), which provided samples of escrow letters that were sent to Florida closing agents.

[7] *Id.*

Retroactive Application and the Contracts Clause

Under Florida law, statutes are presumed to operate prospectively, not retroactively. In other words, statutes generally apply only to actions that occur on or after the effective date of the legislation, not before the legislation becomes effective. The Florida Supreme Court has noted that, under the rules of statutory construction, if statutes are to operate retroactively, the Legislature must clearly express that intent for the statute to be valid.[8] When statutes that are expressly retroactive have been litigated and appealed, the courts have been asked to determine whether the statute applies to cases that were pending at the time the statute went into effect. The conclusion often turns on whether the statute is procedural or substantive.

In a recent Florida Supreme Court case, the Court acknowledged that "[t]he distinction between substantive and procedural law is neither simple nor certain."[9] The Court further acknowledged that their previous pronouncements regarding the retroactivity of procedural laws have been less than precise and have been unclear.[10]

Courts, however, have invalidated the retroactive application of a statute if the statute impairs vested rights, creates new obligations, or imposes new penalties.[11] Still, in other cases, the courts have permitted statutes to be applied retroactively if they do not create new, or take away, vested rights, but only operate to further a remedy or confirm rights that already exist.[12]

Florida's contracts clause states that "no bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[13] Regarding the impairment of an existing contract by the retroactive application of a statute, the Florida Supreme Court recently said:

> "[V]irtually no degree of contract impairment is tolerable." However, we also recognized that the holding that "virtually" no impairment is tolerable "necessarily implies that some impairment is tolerable." The question thus becomes how much impairment is tolerable and how to determine that amount. To answer that question, in *Pomponio* we proposed a balancing test that "allow[ed] the court to consider the actual effect of the provision on the contract and to balance a party's interest in not having the contract impaired against the State's source of authority and the evil sought to be remedied." "[T]his becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective."
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> An impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. However, where the impairment is severe, "[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation

[8] *Walker & LaBerge, Inc., v. Halligan*, 344 So. 2d 239 (Fla. 1977).
[9] *Love v. State*, 286 So. 3d 177, 183 (Fla. 2019) quoting *Caple v. Tuttle's Design-Build, Inc*., 753 So. 2d 49, 53 (Fla. 2000).
[10] *Love*, at 184.
[11] *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.,* 869 So. 2d 1210 (Fla 2004).
[12] *Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 1990).
[13] Art. I, s. 10, Fla. Const.

will be subjected." There must be a "significant and legitimate public purpose behind the regulation."[14]

III. Effect of Proposed Changes:

Section 1 of the bill substantially amends s. 701.04, F.S., in regards to estoppel letters and the satisfaction of mortgages. Specifically, the bill:

- Reduces from 14 days to 10 days the amount of time a mortgagee or mortgage servicer has to send, or cause to be sent, a requested estoppel letter setting forth the unpaid balance of the mortgage loan;[15]
- Requires that if the estoppel letter request is sent by a person other than the mortgagor, the request must include a copy of the instrument showing such person's title in the property or other lawful authorization, and the mortgagee or mortgage servicer must notify the mortgagor of the request; and
- Specifies that the mortgagee or mortgage servicer must send the estoppel letter by first-class mail; by common carrier delivery service; or by e-mail, facsimile, or other electronic means, as directed in the written request, or through an automated system provided by the mortgagee or mortgage servicer for this purpose. However, the mortgagee or mortgage servicer is not required to pay for a common carrier delivery service.

For an estoppel request to be valid under the bill, a written request for an estoppel letter must be sent to the mortgagee or mortgage servicer, by first-class mail, postage prepaid; by common carrier delivery service; or by e-mail, facsimile, or other electronic means at the address made available by the mortgagee or mortgage servicer for such purpose or through an automated system provided by the mortgagee or mortgage servicer for requesting an estoppel letter. The mortgagee or mortgage servicer is deemed to have received the request:

- Five business days after the request sent by first-class mail is deposited with the United States Postal Service;
- The day the request is delivered by a common carrier delivery service; or
- The day the request is sent by e-mail, facsimile, or other electronic means or through an automated system provided by the mortgagee or mortgage servicer for requesting an estoppel letter.[16]

The bill also creates a standard specifying the minimum information that must be included in an estoppel letter (regardless of which party made the request). An estoppel letter must include:

- The unpaid balance secured by the mortgage as of the date specified in the estoppel letter, including an itemization of the principal, interest, and any other charges comprising the unpaid balance; and
- Interest accruing on a per-day basis for the unpaid balance, if applicable.

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[14] *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1192 (Fla. 2017) (internal citations omitted for clarity).

[15] If the 10th day after receipt of a written request is a Saturday, Sunday, or legal holiday, the estoppel letter would be considered timely if sent on the next business day.

[16] If any of these days falls upon on a Saturday, Sunday, or legal holiday, the request for an estoppel letter is considered timely received by the mortgagee or mortgage servicer on the next business day.

In addition, the bill – except for those mortgages for which a notice of lis pendens in a foreclosure action or a suggestion of bankruptcy has been properly filed and recorded – prohibits mortgagees and mortgage servicers from qualifying, reserving the right to change, or conditioning or disclaiming the reliance of others on the information provided in said estoppel letter.[17] However, the bill does allow for mortgagees or servicers of mortgages to send corrected estoppel letters in the event that they determine that a previous letter that was sent was inaccurate. In such case, if the person who requested the original letter receives a corrected letter by 3 p.m. in such person's time zone, at least 1 business day before a payment is issued in reliance on the previous estoppel letter, the corrected estoppel letter supersedes all prior estoppel letters.

If any of the required information in the estoppel letter is inaccurate, and is not corrected as provided above, the mortgagee or mortgage servicer may not deny the accuracy of such information as against any person who relied on it. In addition, such mortgagee or servicer of the mortgage may not return or refuse to accept any funds received in response to an estoppel letter if such funds were received in the location and manner specified in such letter. Further, such mortgagee or servicer must promptly apply such funds to the unpaid balance of the loan properly due under or secured by the mortgage. The bill specifies that the prohibition against a mortgagee denying the accuracy of information in an inaccurate, uncorrected estoppel letter does not, however, affect the right of a mortgagee to recover any sum that it did not include in an estoppel letter from any person liable for payment of the loan or other obligations secured by the mortgage, nor does it limit any claim or defense to recovery that such person may have at law or in equity.

The also bill requires that, within 60 days after the unpaid balance of a loan secured by a mortgage has been fully paid or paid pursuant to the last effective estoppel letter, whichever is earlier, the mortgagee or mortgage servicer must execute in writing an instrument acknowledging satisfaction of the mortgage; have the instrument acknowledged, or proven, and send it or cause it to be sent for recording in the official records of the proper county; and send or cause to be sent the recorded release to the mortgagor or record title owner of the property. For civil actions seeking to enforce these satisfaction and recording requirements, the prevailing party is entitled to recover reasonable attorney fees and costs. Such recording, however, does not relieve the mortgagor, or the mortgagor's successors or assigns, from any personal liability on the loan or other obligations secured by the mortgage.[18]

Finally, the section makes conforming changes to provisions involving the cancellation of liens and judgments under the section.

[17] Any attempt to do so is void and unenforceable under the provisions of the bill.

[18] Essentially, what the proposed provisions of the bill allow, is that if the lender later determines that additional funds are due from the borrower (over and above what was in the last-effective estoppel letter), the lender must release the mortgage; however, the lender will still have an unsecured debt that it may attempt to collect from the borrower or the borrower's successors or assigns.

Section 2 of the bill revises the definition of an "estoppel letter" to be a statement containing, at minimum, the information required for estoppel letters under proposed s. 701.04(1)(b), F.S., and makes a technical change.

Section 3 of the bill is a statement of retroactive application providing that applying the requirements of **Sections 1** and **2** to existing mortgage contracts achieves an important state interest.

Section 4 provides that the provisions of the bill apply to all mortgages existing as of the effective date and entered into on or after that date, as well as to all loans secured by such mortgages.

Section 5 provides an effective date of October 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Sections 3 and **4** of the bill provide for retroactive application of **Section 1** and **2's** provisions to existing mortgages. The bill clearly states the Legislature's intention that the bill's provisions be retroactively applied, and gives the justifications for doing so.

It should be noted that the Fannie Mae standard mortgage document for Florida does not specifically address estoppel letters, but provides for reduced charges due under the mortgage to those charges authorized by law and otherwise appears to adopt Florida law as it may be amended.[19] Current law already regulates estoppel letters, so amendment to the law can be anticipated by those in the industry. The bill does not substantially or significantly affect a lender who sends an accurate estoppel letter, as is currently required. The bill does not impair the monies lawfully due to a mortgage company pursuant to the promissory note, it only affects the use of a mortgage to compel payment

[19] See paragraphs 15(d) and 17 of Florida Single Family Fannie Mae/Freddie Mac UNIFORM INSTRUMENT, Form 3010 (July 2021).

through the foreclosure process. The courts may find the bill applies to outstanding mortgages and is neither unconstitutionally retroactive nor does it unconstitutionally impair contractual rights.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 701.04 and 701.041.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.